SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-537

J. L. PIERCE,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Alabama entered in the above case on May 9, 1974.

OPINION BELOW

The Opinion of the Supreme Court of Alabama is appended hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 9, 1974. Mr. Justice Powell of this Court granted to Petitioner an extension to November 3, 1974 within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 U.S.C. § 1257 (3).*

QUESTIONS PRESENTED

1. Whether the provisions of Title 14, Section 374, Code of Alabama, on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First, Fifth and Fourteenth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary, terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labelled "unrealistic";

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," and test this Court found "unworkable" and "ambiguous";

2. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his liberty and property without due process of law, in violation of the First, Fifth, and Fourteenth Amendments.

3. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein were the Indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First, Fifth, and Fourteenth Amendments.

4. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the Indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First, Fifth and Fourteenth Amendments.

5. Whether the Supreme Court of Alabama, by engafting by judicial construction to Title 14, Section 374, the tests set forth in *Miller v. California*, 413 U. S. 1t (1973), and then applying it to Petitioner's alleged conduct which preceded *Miller* by one year and which was fixed upon the prior, non-construed statute, was *ex-post facts* and violated the Petitioner's right under the First, Fifth and Fourteenth Amendments, and Article I, § 9.

6. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under the *Miller* test by the Supreme Court, abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First, Fifth and Fourteen Amendments and Article I, § 9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, and Eighth and Fourteenth Amendments, and Article I, § 9 of the Constitution, and the pertinent provisions of Title 14, Section 374, Code of Alabama, appear in Appendix B hereto.

STATEMENT

1. The Petitioner was charged in three (3) Indictments which contained a total of nine (9) counts. One count of one indictment alleged that he: with knowledge of its contents, did on, to-wit: May 18, 1972, while at or near 112 Church Street, Montgomery, Alabama, seel, exhibit, or commercially distribute non-mailable and obscene printed or written matter or material to G. R. Brown, to-wit: 1 copy of "The Pussy Kissers".

The other counts varied only as to the name of the publication involved, the date of the event, and the name of the purchaser. None of the indictments set forth the statute alleged to have been violated. The verdict of the Jury was rendered on August 1, 1972 the Petitioner being found guilty. He was sentenced in each of the three cases to pay a fine of $2,000.00 and incarceration for twelve (12) months. The Petitioner was also ordered to perform hard labor for payment of the fines and court costs.

2. At each stage of the proceedings against him, Petitioner challenged the validity of the Indictments, the

standards used at trial, and the evidence proferred by the State. He continually asserted the non-obscenity of the publications involved. After much of the trial proceeded on the theory of "national standards", the trial court informed counsel that he was going to instruct on a theory of "local community standards." Motions for a mistrial based upon illegal, irrelevant and unconstitutional evidence and a motion to exclude the State's evidence were overruled by the court. Defense counsel also made objections to the oral charge to the jury as not-conforming with the then standards for determination of obscenity vel non.

3. On June 29, 1973, the Alabama Court of Criminal Appeals affirmed the conviction without opinion, and also denied an application for rehearing on July 26, 1973.

4. On May 9, 1974, the Supreme Court of Alabama, upon a Petition for a Writ of Certiorari, affirmed the conviction. The Court, looking at the 1961 Act under which the magazine was declared obscene, held, *inter alia*, that:

(a) "The tests set forth in *Miller* v. *California*, 413 U.S. 15 (1973) are engrafted by indicial construction to the 1961 Alabama obscenity statute;"

(b) "With the *Miller* engraftments the 1961 Alabama obscenity statute is constitutional as applied in the context of the instant case;"

(c) "Contemporary community standards referred to in *Miller* are statewide standards in Alabama. The Court said that:

In a 1971 per curiam decision this court affirmed a finding that the matter before the lower court was obscene in an equitable matter under Section 374(5). Section 347(5) is also dependent upon the Section 374(3) definition of obscenity. The court affirmed by finding that the definition embodied the then current constitutional tests:

> "From viewing [exhibits] we are persuaded that in them we find a coalescence of the following elements: (a) the dominate theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." McKinney v. State, 287 Ala. 648, 254 So. 2d 714 (1971), cert. denied, 405 U.S. 1075 (1972). [Since there are a number of cases involving McKinney before this court, this case will be referred to as *McKinney I.*]

* * *

Thus, *prior to June 21, 1973, in order to affirm a conviction for violating Section 374(4) the court would have to be satisfied that the above tests had been met.* However, in *Miller* and its companion cases decided by the U. S. Supreme Court in 1973, new constitutional tests were established which were designed to eliminate the confusion caused by the so-called *Roth-Memoirs* tests described in *McKinney I.*

* * *

The construction in *McKinney I* supplied all the elements of *Roth-Memoirs* tests even through these

elements were missing from the statute as drafted. Similarly, *this court now specifically incorporates* the *Miller* guidelines or tests heretofore set out into its construction of the word "obscene" in Section 374(3). Thus the operation of the provisions of Section 374(4) applicable in this case is limited to matter which depicts or describes sexual conduct. The regulated matter is more specifically restricted to (a) "Patently offensive representation or description of ultimate sexual acts, normal or perverted, actual or simulated," or (b) "Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Further, the state need only prove the work, taken as a whole, lacks serious literary, artistic, political or scientific value, rather than "utterly" without such value as was *formerly* the test.

* * *

In adopting the new *Miller* standards this court wants to make clear that it is abandoning the *Roth-Memoirs* tests insofar as they conflict with *Miller*. Thus any portion of *McKinney I* and *Visual Educators, Inc. v. Koeppel*, 289 Ala. 410, 268 So. 2d 22 (1972) in conflict with *Miller* are expressly overruled. Coalescence of the three-pronged *Miller* test *must now be demonstrated before a conviction may be had* in an obscenity case.

* * *

As sections of 374(3) and 374(4) are applicable to the instant case this court holds that they are constitutional with the judicially engrafted *Miller* standards. (emphasis supplied) (see Appendix A)

5. The Supreme Court denied an Application for Rehearing on June 6, 1974.

REASONS FOR GRANTING THE WRIT

1. State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the First Amendment standards set forth in *Miller v. California,* 413 U.S. 15. Title 14, Section 374, Code of Alabama as it was written at the time Petitioner was arrested, tried and convicted in these cases, did not comply with the standards set by *Miller.* Nor has that ordinance been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that State statutes which regulate obscene material must be carefully limited. And,

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

And further, that,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard-core" sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California,* supra.

Title 14, Section 374(3), Code of Alabama provides that:

> "'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

Nowhere does this statute regulate the depicting or describing of sexual conduct as required by *Miller*, supra. Nor has this statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For this reason, Title 14, Section 374, Code of Alabama, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply with the constitutional standards set out in *Miller v. California.*

Perhaps it can be argued that Title 14, Section 374, Code of Alabama was constitutional in light of the law at the time the Petitioner was arrested.

In 1970, perhaps it was constitutional. Now, post-*Miller*, it is not. In *Visual Educators, Inc. v. Koeppell*, 268 So. 2d, 22 (1972), the Alabama Supreme Court followed the decisions of this Court in incorporating the *Memoirs* requirements in the application of the State statute in order to make it valid. However, this Court has now abandoned *Memoirs v. Massachusetts*, 383 U.S. 413, (1966), and its tests, in particular the test of "utterly without redeeming social value." However, no member of this Court today supports the *Memoirs* formulation. Without the *Memoirs* test to rely on, Title 14, Section 374 is without support and therefore becomes impermissibly vague for the reasons set out above.

It is the position of Petitioner that the statute under which he has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 (1957).

In *Miller v. California*, 413 U.S. 15, this Court promulgated a new constitutional standard for determining obscenity. Mr. Chief Justice Burger stated that:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

Further, Mr. Chief Justice Burger stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these

> specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

Miller v. California, supra, is the key case in which this Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that this Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when this Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not clearly so great as the break with *Memoirs* that was handed down by this Court in *Miller v. California,* supra, as far as specifically designating prohibited material is concerned. This Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and this Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

Clearly, if the provisions of the State statute are limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the State, or if specific hard core sexual conduct has been read into the statute by authoritative judicial construction, the present statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Alabama Legislature to create legislation anew, adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the Courts. Before the appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Alabama statute cannot be authoritatively construed to meet the *Miller* test of specificity.

Any case, criminal or civil, pending trial or appellate review, based on the present statute which clearly does not contain the *Miller* test of specificity, should be set aside. It is clear that any attempt at authoritative judicial construction by the appellate courts of Alabama incorporating the *Miller* test must fail at this juncture because the statute as written fails to give any person fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

This Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of Law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction punishes one for conduct that was not criminal at the time it is committed. Hence such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Alabama statute because it fails to give a person of ordinary

intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held criminally responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

Just recently this Court reiterated that "(i)it is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined."

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution and a ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972).

2. The Petitioner is condemned by the Alabama Courts to spend three years in prison and to pay $6,000.00 in fines for selling publications he could not know were legally obscene at the time he sold them, and which under the

Roth-Memoirs test, which the Supreme Court of Alabama acknowledged to be controlling in its decision in *Visual Educators, Inc. v. Koeppell,* 268 So. 2d 22 (September 28, 1972), and under the *Redrup* application by this Court in summarily reversing 31 similar cases, he had a right to believe and expect would ultimately be found not to be legally obscene by this Court. This Court in *Miller* changed the operative obscenity law and set forth "freshly written standards defining obscenity which until (that) decision, were never the part of any law." Now, the Supreme Court of Alabama has "specifically incorporate (d) the *Miller* guidelines or tests . . .into its construction of the word 'obscene' in Section 374 (3) of Title 14, Alabama Code of 1940, as amended, Recompiled 1958, (Supp. 1971), which until its May 9, 1974, decision in this case could not have been part of the law of Alabama.

For that Court to conclude that it has *heretofore* construed Section 374 (4) to contain the *Miller* requirement for specificity by its decision in *McKinney v. State,* 287 Ala. 648, is to misconstrue what this Court intended in its *Miller* and related decisions. Rather that *McKinney I,* the Petitioner had a right to rely on the Alabama Supreme Court's pronouncements in *Visual Educators, Inc. v. Koeppell,* supra, rendered ten months after *McKinney I,* in which it set forth the "three elements (which) must be satisfied independently in order to find that the material in question is obscene.

> "It must be established that: '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of representation

> of sexual matters; and (c) the material is utterly without redeeming social value' ...If any one or more of the above-mentioned elements is found to be lacking, the material cannot be found to be obscene.
>
> . . .
>
> "It should also be noted that the 'contemporary community standards' referred to in the '*Roth* test' are national in scope, rather than local or state standards."

Chief Justice Burger, in *Miller*, recognized what this Petitioner understood with reference to the materials he was selling:

> "*Memoirs* required that to prove obscenity, it must be affirmatively established that the material is 'utterly without redeeming social value' – *a burden virtually impossible to discharge under our criminal standards of proof.*" (Emphasis supplied).

The Petitioner certainly had the right to rely on the fact that 31 cases involving materials similar in nature to the materials sold by him in this case were summarily reversed by this Court *Per Curiam, Redrup v. U.S.* In each of the 31 cases reviewed by this Court, the Defendant had been found guilty of selling one or more allegedly obscene publications. His conviction had been upheld by either the highest State court or Federal Circuit Court. This Court, in reversing those decisions, was telling him and others similarly situated that what he was selling was protected materials under the First Amendment to the United States Constitution. As eloquently pointed out by Justice Jones' dissent in *McKinney v. City of Birmingham*, _____Ala._____, So. 2d (m.s.S.C. 484 and S.C.

485 – May 9, 1974), he also had or should have the safeguards afforded him by Article I, Section 4, of the Alabama Constitution.

For the Alabama Supreme Court to judicially engraft the *Miller* standards onto Section 374 (3) and Section 374 (4) would be to make meaningless the protection attempted to be afforded this Petitioner by Chief Justice Burger when he wrote:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive (hard-core) sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

It is unthinkable that the five Justices of this Court who agreed to change the standards for determining obscenity intended that the various State courts would make criminal that which was not criminal before.

Many jurisdictions, including those of Florida, Tennessee, Louisiana, Indiana, Iowa, Arkansas, and just recently, Massachusetts, among others, have had their *McKinney I* cases and statutes with a definition of obscenity such as found in Section 374 (3), but their courts have refused to re-draft their obscenity statutes. The primary reason given is that to do so would amount to a denial of due process due to lack of adequate notice.

We respectfully submit that the Supreme Court of Alabama certainly has the right to judicially engraft the *Miller*

standards onto Section 374 (3) and Section 374 (4), but that its application should be prospective and not retroactive.

3. The Court's failure to strike down the applicable statute as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an *ex post facto* law. All those actions done before this Court's announcement of new standards and which were done innocently under the old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the Constitution from passing laws of this nature and surely the Supreme Court of Alabama and the various trial courts must be barred by the Due Process clause from achieving precisely the same results by judicial construction.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss*, 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a Court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

This has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law, and that "no one may be

required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453. See also: *Rabe v. State of Washington*, 405 U.S. 313 (1972); *Wright v. State of Georgia*, 373 U.S 284 (1963); *Palmer v. City of Euclid*, 402 U.S. 544 (1971; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

If the principles promulgated by this Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner herein for alleged conduct said to be violative of the statute at a time during 1970, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10, of the *United States Constitution*, because the State would be punishing Petitioner for conduct not criminal at the time he committed it, in that the said criminal statute did not give fair warning of the conduct which it prohibits, and the standards to be applied.

An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action", or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (emphasis supplied).

This Court has said that "no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *Kring v. Missouri*, 107 U.S. 221, 235.

Until such time as the State of Alabama enacts new legislation specifically defining prohibited "hard-core" sexual conduct, or until such time as the Supreme Court of Alabama authoritatively construes the statute to specifically define hard-core sexual conduct, to thus give fair notice to future defendants, there is no Constitutionally permissible statute regulating obscenity.

4. *Title 14, Section 374, Code of Alabama* and the Complaints filed against the Petitioner do not clarify what meaning is attributed to the word "knowingly", nor was "guilty knowledge" proved at the trial. The statute and the Complaints were required to set forth precisely the degree of "guilty knowledge" that a Defendant is required to defend against. Moreover, as we demonstrate hereinafter, actual "guilty knowledge" of the nature, contents, and character of the material is constitutionally required. See *Hamling v. United States*, _____U.S._____, 41 L.Ed.2d 590 (1974).

In *Smith v. California*, 361 U.S. 147 (1959), this Court held that the strict liability feature of the California obscenity law was unconstitutional. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. 160.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by the Court in *Smith v. California*, supra. Sex is not synonymous with obscenity,

and knowledge of the contents of a writing dealing with sex does not meet the tri-partite knowledge requirements of *Hamling, supra.* Mere proof that a publisher, landlord, or distributor knows that he distributes "Tropic of Cancer", "Lady Chatterley's Lover", "Fanny Hill", "Pleasure is My Business", "Lust Pool", "Shame Agent", "Sin Hooked", "Lust Job", "Sex Life of a Cop", "Solis", etc. in no way establishes, it is submitted, that such publisher or distributor knows the nature, character and contents of those publications. The decision of this Court make this abundantly clear. It is likewise clear that the statute in question herein permits such a strict liability. And the problem is further compounded by the statute's and the court's preclusion of the Petitioner from defending on the issue of obscenity *vel non* at all.

Mr. Justice Rehnquist has defined the requisite criminal knowledge for obscenity convictions: "It is constitutionally sufficient that the prosecution show that a defendant *had knowledge* of the contents of the materials he distributes, *and* that he *knew* the character *and* nature of the materials" *Hamling v. United States,* ____ U.S.____, 41 L.Ed.2d 590 (1974) (emphasis supplied). Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes *qua* obscenity crimes (see *Hamling* and *Smith, supra*), *actual* knowledge of the contents, nature, and character of the material *is* required for conviction. From *Roth v. United States,* 354 U.S. 476 (1957), through *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), to *Miller v. California,* 413 U.S. 15 (1973), this Court has been attempting to define what is "obscene" and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is

proscribed. If nothing else, seventeen (17) years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused. If actual knowledge of the contents, nature, and character of materials is required for a conviction of the substantive offense, then at least that actual knowledge must be *found* before one can be found guilty of violating the law. Thus, the mere showing of a "managership", possession or sale without proof of actual knowledge of the nature, character, and contents of materials is insufficient as a matter of constitutional law to uphold the convictions herein.

First Amendment rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overriding, and compelling state interest, and even then such incursions are to be severely limited. *Dombroski v. Pfister,* 380 U.S. 479; *Keyishian v. Board of Regents of New York,* 385 U.S. 589; *DeJonge v. Oregon,* 299 U.S. 353. If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental regulation. *NAACP v. Button,* 371 U.S. 415; *Shelton v. Tucker,* 364 U.S. 479. Where statutes on their face or as applied are vague and overbroad, then the chilling effect *Dombroski* warns of rears its ugly head.

There is a lack of Due Process of Law and fundamental fairness when persons cannot be adequately forewarned that their presumptively lawful activities might someday be used against them in a criminal prosecution. People tend to steer far away from activity that might later be termed "dealing in

obscenity" and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 356 U.S. 513; *N.A.A.C.P. v. Button,* 371 U.S. 415.

In order to avoid self-censorship and a chilling effect on *First Amendment* freedoms, see *Smith v. California,* 361 U.S. 147; *Dombroski v. Pfister,* 380 U.S. 479, then it is necessary that convictions be based on a *knowing* violation of the law, i.e., a *knowing* sale, distribution or possession with intent to disseminate of *obscene* material *with knowledge* of its contents, nature, and character. See *Hamling, supra.*

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from and free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski, supra,* at 494. See, *NAACP v. Button,* 371 U.S. 415; *Keyishian v. Board of Regents of New York,* 385 U.S. 389; *Speiser v. Randall,* 357 U.S. 513; *Shelton v. Tucker,* 364 U.S. 479; *DeJonge v. Oregon,* 299 U.S. 353; *United State v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 472 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969):

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by

> authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

Dombroski, supra, at 490-491.

The obscenity statute here involved, Title 14, Section 374 Code of Alabama, purports to punish the knowing possession, sale, or distribution of obscene materials. It does not purport to punish the possession, sale or distribution of books or writings dealing with sex. *Scienter* means guilty knowledge. This means that the prosecution in any obscenity case must charge and prove that the Accused *knew* the contents, nature, and character of the material (see *Hamling, supra*), not merely that the Accused knew that the material dealt with sex.

There can be no question, it is submitted, if the obscenity statute is not to be unconstitutionally applied, that the Complaints must allege this knowledge. Without such allegations, the Complaints are fatally defective, and the convictions and the statute on which they are based are unconstitutional. See *Hamling v. United States,* _____US._____, 41 L.Ed.2d 590 (1974), and *Miller v. California,* 413 U.S. 15.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Alabama.

Respectfully submitted,

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APPENDIX A

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
SUPREME COURT OF ALABAMA
OCTOBER TERM 1973-74

Ex Parte: J. L. Pierce
(IN Re: J. L. Pierce

S.C. 483

v.

The State of Alabama

Petition for a Writ of Certiorari
to the Court of Criminal Appeals

HEFLIN, CHIEF JUSTICE.

The major holdings of this case are as follows:

1. The tests set forth in *Miller v. California*, 413 U.S. 15 (1973) are engrafted by judicial construction to the 1961 Alabama obscenity statute.

2. With the Miller engraftments the 1961 Alabama obscenity statute is constitutional as applied in the context of the instant case.

3. Contemporary community standards referred to in *Miller* are statewide standards in Alabama.

This case is before this court on a Writ of Certiorari to the Court of Criminal Appeals. Petitioner Pierce was charged with violating Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958) (Supp. 1971), in three separate indictments totaling 11 counts, all alleging that Pierce did "sell, exhibit, or commercially distribute non-mailable and

obscene printed or written matter." The three cases were consolidated, and after a trial to a jury, Pierce was found guilty on all counts. Pierce appealed to the Court of Criminal Appeals which affirmed his conviction and denied rehearing, both without opinion. This court issued a Writ of Certiorari to the Court of Criminal Appeals to determine whether the statute under which Pierce was prosecuted meets the constitutional requirements of the First, Fifth and Fourteenth Amendments as enunciated in 1973 cases decided by the Supreme Court of the United States, and, to determine the precise effect of these recent developments on cases not finally decided at the time the decisions were handed down.

On three separate occasions, members of the Montgomery Police Department entered Jimmy's News Stand in Montgomery, Alabama, and purchased several items from petitioner Pierce at random. Officer Brown purchased "The Pussy Kissers," "My First Trick," "The Beautiful Yogi and the Stud," and "Italia"; Detective Wright purchased the "Filthy Funny Book" on one occasion and "The Young Suckers," "The Hardup Head Mistress," "Little Nudist Quarterly" and a newspaper-type publication identified as "Cruelty and Sex" on another occasion. All material purchased by both officers was in an area separated from the rest of the bookstore by a wire cage upon which a notice was posted stated, "Persons under 21 not admitted."

The defendant attempted to put into evidence a number of exhibits tending to show what community standards were extant in Montgomery, Alabama, but an objection to the introduction of the exhibits was sustained. Defendant did call a witness who was allowed to testify as to community standards. The trial court charged that in determining whether the matter in evidence was obscene the jury was to consider the community standards of Montgomery, Alabama.

In view of the great volume of literature generated both by courts and legal commentators dealing with the "intractable obscenity problem," it hardly seems necessary for this court to add to the deluge by an extended discussion of the development of the current constitutional guidelines for treating such problems. The most authoritative analysis of what the United States Supreme Court has attempted to do over the years is found in that court's latest expressions (on June 21, 1973) on the subject and need not be repeated here. See *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 (1973); 37 L.Ed.2d 419; *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *United States v. 12 200-Ft. Reels of Super 8 mm. Film,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *United States v. Orito,* 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Kaplan v. California,* 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973).

The task before this court, therefore, is not to dwell on what has gone before, but to examine the issues presented by the case at hand, and in so doing to attempt to fashion some guidance for courts, prosecutors, defendants, juries and prospective defendants in this state which will conform with these most recently promulgated constitutional guidelines.

Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958) (Supp. 1971), under which the petitioner was convicted, reads, in part, as follows:

> "Every person who ... sells, exhibits or commercially distributes, or gives away or offers to give away ... any obscene printed or written matter or material ... shall be guilty of a misdemeanor ...."

For the purpose of Section 374(4) the word "obscene" is defined by Section 374(3):

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

In a 1971 per curiam decision this court affirmed a finding that the matter before the lower court was obscene in an equitable matter under Section 374(5). Section 374(5) is also dependent upon the Section 374(3) definition of obscenity. The court affirmed by finding that the definition embodied the then current constitutional tests:

> "From viewing [the exhibits] we are persuaded that in them we find a coalescene of the following elements: (a) the dominate theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." McKinney v. State, 287 Ala. 648, 254 So.2d 714 (1971), cert. denied, 405 U.S. 1075 (1972). [Since there are a number of cases involving McKinney before this court, this case will be referred to as *McKinney I.*]

Thus, prior to June 21, 1973, in order to affirm a conviction for violating Section 374(4) the court would have to be satisfied that the above tests had been met. However, in *Miller* and its companion cases decided by the U.S. Supreme Court in 1973, new constitutional tests were established which were designed to eleiminate the confusion caused by the so-called *Roth-Memoirs*[1] tests described in *McKinney I.*

In *Miller,* the court attempted to provide "positive guidance" to other courts dealing with obscenity issues. The court recognized "the inherent dangers of undertaking to

regulate any form of expression." Therefore, the court continued, "[s]tate statutes designed to regulate obscene materials must be carefully limited." The first limitation mentioned by the court was the scope of the statute: "We now confine the permissible scope of such reguilation to works which depict or describe sexual conduct." Furthermore, "that conduct must be specifically defined by the applicable state law, as written or as authoritatively construed." Other guidelines are succinctly stated in the following language:

> "The basic guidlines for the trier of facts must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value."

The court sent on to hold that "contemporary community standards" did not mean a national standard, and that a statute which refered to a state standard would be constitutionally permissible.

APPLICATION OF MILLER

The first issue this court must deal with is whether the statute contains the necessary specificity as required by *Miller.* The U.S. Supreme Court in *Miller* invites judicial construction as a method of supplying the required specificity if such is absent from the statute. As already mentioned, this court in *McKinney I* limited the reach of the statute by construing it as encompassing the then current *Roth-Memoirs* tests. The construction in *McKinney I* supplied all the elements of

Roth-Memoirs tests even though these elements were missing from the statute as drafted. Similarly, this court now specifically incorporates the *Miller* guidelines or tests heretofore set out into its construction of the word "obscene" in Section 374(3). Thus the operation of the provisions of Section 374(4) applicable in this case is limited to matter which depicts or describes sexual conduct. The regulated matter is more specifically restricted to (a) "Patently offensive representation or description of ultimate sexual acts, normal or perverted, actual or simulated," or (b) "Patently offenseive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Further, the state need only prove the work, taken as a whole, lacks serious literary, artistic, political or scientific value, rather than "utterly" without such value as was formerly the test.

The argument is made that *Miller* should not be retrospectively applied and that to construe the statute and apply it to the defendant in the instant case would violate ex post facto principles. This argument is without merit since the U.S. Supreme Court in a footnote to *Miller* states that "existing statutes as construed *heretofore* or hereafter may be adequate." (Emphasis added) *McKinney I* was decided prior to the defendant's arrest, indictment and conviction. *McKinney I* limits the operation of Section 374(4) to at least lewd descriptions or pictures of female genitals. This Court, in holding the matter before it to be obscene in an independent review in *McKinney I,* describes the matter as follows:

> "The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spreadeagled apart, exposing her genital organs."

* * *

> "The appellant refers again and again in his briefs to the magazines or 'girlie' magazines. A more apt description would be 'genital' magazines."

Thus there is no doubt that from November 18, 1971, the date *McKinney I* was issued, all persons were on notice that magazines which contained lewd photographs or descriptions of female genitals were subject to Section 374(4).

In the case at hand, at least one exhibit covered in each indictment contains lewd photographs or descriptions of female genitals. There can be no doubt that as to such photographs or descriptions the *Miller* requirement for specificity had been supplied by *McKinney I* and that as applied to said matter, the potential vagueness of the statute had been cured by prior judicial construction.

The other ex post facto problem arises because *Miller* establishes a new social value norm. If the defendant would have been protected by the test of *Roth-Memoirs* but not by the *Miller* standards then arguments pertaining to ex post facto considerations could arise. The defendant here was found guilty under the old, but more stringent, "utterly" test, however, and an independent examination of evidence demonstrates that the jury's determination that the matter was utterly without redeeming social value was correct. If a defendant is protected by the restrictiveness of the "utterly" test then it is inescapable that he is within the protection shield of the "serious" test for any publication which is utterly without value could have no serious value. Thus in this case there is no ex post facto problem applicable to the newly-created three-pronged test of *Miller*.

In adopting the new *Miller* standards this court wants to make clear that it is abandoning the *Roth-Memoirs* tests

insofar as they conflict with *Miller.* Thus any portion of *McKinney I* and *Visual Educators, Inc. v. Koeppel,* 289 Ala. 410, 268 So.2d 22 (1972) in conflict with *Miller* are expressly overruled. Coalescence of the three-pronged *Miller* test must now be demonstrated before a conviction may be had in an obscenity case.

It should be noted that this opinion does not address *all* the provisions of Section 374(4). Sections 374(1)-(16) (the 1961 obscenity statute) purport to accomplish several ends: (1) To define obscene matter and prohibit the sale, etc., of such matter, (2) to provide the state an opportunity to get a civil determination of obscenity pertaining to a particular work or works, and to obtain an injunction pursuant thereto, and (3) to provide criminal procedures and sanctions for selling, etc., mailable matter which had been declared obscene in such civil action. The instant case does not involve (2) or (3) in any way and, therefore, should not be read as approving or disapproving these other facets of the statute. For a treatment of (3), see *McKinney v. State,* ____ Ala. ____, ____ So.2d ____ (m.s. S.C. 486 - May 9, 1974) released simultaneously with this opinion.

As sections of 374(3) and 374(4) are applicable to the instant case this court holds that they are constitutional with the judicially engrafted *Miller* standards.

SCOPE OF APPELLATE REVIEW

It is settled that an appellate court has the power to review determinations concerning the obscenity of matter entered into evidence, but the scope of such power varies. The view already adopted by this court and here reaffirmed is that, on appeal, the appellate courts are to make an

independent determination of obscenity, regardless of the finding in the trial court. See *McKinney I*, supra. See also *Childs v. Oregon*, 431 F.2d 272 (9th Cir. 1970); *Blue Island v. DeVilbiss*, 41 Ill.2d 135, 242 N.E.2d 761 (1969).

Since obscenity is a mixed question of constitutional law and fact, it is clear that such independent review provides greater assurance that no person will be subject to criminal punishment unless the matter in question really is obscene. Indeed in *Miller*, the Supreme Court, in rejecting the "utterly without redeeming social value" test, stated:

> "We do not adopt as a constitutional standard the *'utterly* [emphasis original] without redeeming social value' test of Memoirs v. Massachusetts, supra, 383 U.S., at 419, 86 S. Ct., at 977 (1966); that concept has never commanded the adherence of more than three Justices at one time. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment *are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.* See Kois v. Wisconsin, supra, 408 U.S. at 232, 92 S. Ct., at 2247 (1972); Memoirs v. Massachusetts, supra, 383 U.S., at 459-460, 86 S. Ct., at 998 (1966) (Harlan, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 204, 84 S. Ct. 1676, 1686, 12 L. Ed. 2d 793 (1964) (Harlan, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 284-285, 84 S. Ct. 710, 728, 11 L. Ed. 2d 686 (1964); Roth v. United States, supra, 354 U.S., at 497-498, 77 S. Ct., at 1315-1316 (1957) (Harlan, J., concurring and dissenting)." (Emphasis supplied)

COMMUNITY STANDARDS

In the case at bar the trial court instructed the jury that "contemporary community standards" meant the community standards of Montgomery, Alabama. In *Miller*, the court upheld the use of state standards for determining contemporary community standards, and, therefore, there can be no question that the statewide community standards meet the *Miller* test. There is language, however, in *Miller* that intimates that even more localized standards may be acceptable.

This court is of the opinion that the community standards should be statewide.

Other state courts have faced this issue and the results vary. Of the several state court which have adopted statewide community standards only a few have bothered to furnish a reasoned analysis supporting their choice. In a pre-*Miller* case, the Supreme Court of Wisconsin adopted a state standard since a Wisconsin statute permitted a prior judicial determination of obscenity to be admitted as evidence of obscenity and to establish scienter in criminal prosecutions under certain conditions. That court felt for such an arrangement to be workable a state standard was demanded. See *McCauley v. Tropic of Cancer*, 20 Wis. 2d, 134, 121 N.W.2d 545 (1963). In another pre-*Miller* case, *In re Giannini*, 69 Cal. 2d 553, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), the Supreme Court of California adopted a state standard. After discussing the possibility of defining "community" to mean something less than the state as a whole the court stated:

> "Although these considerations [favoring 'local' community] are not de minimis, we conclude that on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of a smaller community: whether it should be a city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of the state criminal law . . . : we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform 'community'."

Both of the considerations mentioned by the Supreme Court of California have continued viability in a post-*Miller* environment.

Alabama would be faced with many problems in determining the exact scope of a community if it were smaller than the state as a whole. On first impulse, one would think that the county would be an appropriate geographical unit for establishing standards because one assumes a natural relationship between the county and the jury vicinage. However, this assumption is not always accurate, for in Alabama, there are a number of counties that have judicial divisions separating geographical areas in a county with separate courthouses for each such area. Prospective jurors that are assembled for trial selection in such counties come from within the bounds of such geographical divisions and can not be representative of the entire county. Such judicial geographical divisions (which are even applicable to the circuit courts) within such counties present problems pertaining to localized standards on a countywide basis.

Assuming for the sake of argument that standards will vary from county to county, then arguably, the standards may also vary from city to city. Moreover, taking the assumption one step further, there may be within a given city different standards, say, in residential neighborhoods as opposed to the areas surrounding a college campus and, perhaps, a trial court judge would have to deal with a number of standards. This myriad of possibilities for standards, coupled with the temporal requirement that standards be "contemporary" clearly demonstrates the burden which would be placed on the judicial system in trying to determine which standards are applicable at which location at which time.

Furthermore, if community is construed to be an area smaller than the state, then the problem arises as to whether standards must be proved by extrensic or expert testimony, or whether the trier of facts (jury or trial judge) will make the determination without special proof of standards. If a jury is deemed to be the embodiment of the community, then proof of standards for the jury's sake would be superfluous. If a judge without a jury is allowed to make the determination under the same concept then there would be no need of proof of standards. But how would a reviewing appellate court be informed as to what standards were applied below? Under this alternative method an appellate court could make no independent determination of the issue of obscenity vel non. The results under such a system would cause many disparities in criminal convictions. While under our system of federalism it is fundamental and desirable for the national government to allow the states to develop their own standards, there is no underlying constitutional or policy basis mandating deference to "local communities," and to do so most certainly would lead to abuse of the criminal process.

Dean Pound, in his work on jurisprudence, discusses the desirable and undesirable aspects of justice without law by which he means "justice according to magisterial good sense [which] is more apt to accord with the moral sense of the community" as opposed to justice according to the rule of law. It is submitted that the use of standards of less than the state as a whole would approach this concept of magisterial justice without law. Pound advises as follows:

> "So far as the function of the legal order is merely to adjust controversies peaceably, administration of justice without law has its place. But this is no more than a small part of the function of the legal order. Such an administration of justice at best only partly maintains the social interest in the general security. The social interest in the security of transactions and the social interest in the security of acquisitions are but feebly maintained and may even be defeated. The individual interest of personality (an important aspect of the social interest in the individual life) is defeated if the limits of the rights which secure it are not set off by reasonably fixed precepts and maintained *by a uniform course of judicial action.* Under an Oriental regime [previously defined to mean one where a magistrate has total discretion] one must take many chances in believing that his ideas of justice will agree with those for the time being of the judge or magistrate when he passes on the matter. One cannot with safety do anything involving large expenditure of labor or money or extending over a long time. Oriental justice has gone along with a very low degree of economic development. With increasing complexity of affairs the bad effects of such lack of rule in the administration of justice are more acute. Civilization increases this complexity and so demands law in the sense of rule and order in the administration of

justice, so that men may act assuredly to the future. *One essential in the administration of justice in a modern state is uniformity.* Experience has shown abundantly that this is attainable only by measuring relations and situations, as they become subjects of controversy, by reason.

"... The idea, sometimes urged, that courts should administer what is called 'the will of the people' for the time being in each case is as out of place in a developed social and economic order as the corresponding sixteenth and seventeenth-century doctrine that in every case they ought to administer the will of the King for the time being. If left to act freely in individual cases no will, either of King or of people, is sufficiently set and constant to insure an equal and uniform administration of justice. Judicial or magisterial caprice is incompatible with the social interest in the general security. Even in small causes it is the formal procedure which is to be dispensed with or made informal (without, however, dispensing with full and fair hearing of both sides) not the substantive law defining the rights of the parties." (Emphasis added) 2 R. Pound, *Jurisprudence* 369-71 (1959).

An interpretation of "community" which would permit the same act (i.e., selling a given book) to be criminal in one locality in the state and legal in another runs counter to the concept of the uniform administration of justice. Section 104(14) of the Alabama Constitution of 1901 indicates that the framers of our state constitution endeavored to develop a policy that criminal law should be uniformly applied since that section prohibits the legislature from passing a special, private or local act fixing the punishment of crime.

Furthermore, by adopting the new Judicial Article to the state constitution in December of 1973, the people of this state placed Alabama in the vanguard of a nationwide movement to secure uniformity in the administration of justice at the state level. A salient feature of this constitutional plan is a unified court system premised on the concept that in a modern, mobile society, the people have the right to receive uniform administration of justice throughout the entire state. This unified court system has been unanimously recommended by all of the organizations who have made recent in-depth studies in the field of judicial administration among the state court systems. Such system received the stamp of approval of the National Conference of the Judiciary gathered at Williamsburg, Virginia in 1971 in its consensus statement.

Moreover, on the civil side, this court recently adopted the Alabama Rules of Civil Procedure, patterned after the federal rules, which also reflect the spirit of uniformity. There is even a specified rule which prohibits local rules unless they are approved by this court. See Rule 83, Alabama Rules of Civil Procedure.

After making such strides forward in requiring a high degree of uniformity in the administration of justice from an organizational and procedural standpoint, to permit the substantive law to become a chameleonic hodgepodge based on localized viewpoints would be a backward step.

While it is true that the jury in a criminal case is selected from a geographical area less than the state as a whole, there is no real reason to believe that there is any great difference in the morals of the average citizen of this state depending upon where he happens to live. That which appeals to the prurient interest and is patently offensive to the average rural

dweller probably has the same impact on the average city dweller. This view is strengthened by considering the mobility of modern society, coupled with the impact of the mass media on contemporary thought. Citizens of this state often live in one locality and work elsewhere. Rural dwellers often work in towns or cities. Persons living in towns and cities often have strong ties with those who live in rural areas, either by family relationship or through friendship. Citizens of this state travel from one end of the state to another almost on a daily basis. In addition, our citizens are exposed to the same news coverage, either in newspapers or through electronic media, and people in all sections of the state are exposed to the same televised entertainment. All of these factors contribute to a degree od homogeneity in the average citizens of our state which would tend to neutralize any variance in standards based on a locality. Alabama may have more such homogeneity than most states.

This is not to deny that there may be persons or groups of persons whose views of "prurient interest" and "patently offensive" differ widely. Admittedly, some may take an "anything goes" attitude while others would condemn even a bare feminine ankle. But it is the standard of the *average* citizen of this state that the trier of facts is to apply.

In short, it is the opinion of this court that statewide standards are not only desirable, but are also feasible. Therefore it was error for the trial court to charge the jury that the standard to be applied was that of Montgomery, Alabama. See also *State v. J. R. Distributors, Inc.*, 82 Wash. 2d 584, 512 P.2d 1049 (1973); (statewide standards approved).

The question arises, however, as to whether this was reversible error. At least one publication involved in each

indictment is hard core pornography. Following the precedent of *McKinney I*, this court, based on the evidence in this case, finds such publications as being offensive to the contemporary community standards of Alabama and the Nation, as well as of the City of Montgomery. Therefore, the instruction of the trial court was error without injury *in this case.* Supreme Court Rule 45.

ADMISSIBILITY OF OTHER MATERIALS

The last issue raised by the instant case is whether the trial court erred in ruling that other books purchased in Montgomery, Alabama, could not be admitted as evidence of community standards. There is a split of authority on this issue, some courts holding that such matter is admissible and others holding that it is inadmissible. See generally, Annotation, 5 A.L.R. 3d 1158 (1965). One view is that such evidence is irrelevant to the issue of whether the matter before the court is obscene, since the fact that other publications are in bookstores and on news stands is no indication that they are sold and widely read. This defect can be cured, however, by establishing a proper foundation prior to the introduction of the matter.

In *United States v. Manarite,* 448 F.2d 583 (2d Cir. 1971) the Second Circuit Court of Appeals addressed this problem:

> "Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible *in the absence of proof that the material enjoys a reasonable degree of community acceptance.* Womack v. United States, 111 U.S. App. D. C. 8, 294 F. 2d 204, 206 (1961), cert. denied, 365, U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (1961). Such proof would normally be supplied by expert witnesses. No such proof was

> offered. In the absence of this foundation, the allegedly similar pornographic material by itself means nothing more than that other persons are engaged in similar activities." (Emphasis added).

The underlying rationale of this position has been stated by the late Mr. Justice Harlan:

> "[T]he trier of an obscenity case must take into account 'contemporary community standards,' *Roth v. United States*, 354 U.S. 476, 489 .... The community cannot, where liberty of speech and press are at issue, condemn that which is generally tolerates." *Smith v. California*, 361 U.S. 147 (1959) (Harlan, J. concurring in part and dissenting in part).

See also *Yudkin v. State*, 299 Md. 223, 182 A. 3d 798 (1962) (Trier of fact has the "right to read, or be informed of, the contents of comparable books that have been generally accepted or tolerated by the public.")

Therefore, once the proper predicate has been laid by demonstrating to the trial court's satisfaction that the matter offered as evidence of contemporary standards enjoys a reasonable degree of acceptance or tolerance (either by way of expert testimony, volume of sales, or other means) the matter should be admitted.

This not to hold, however, that every *book* or photograph proffered must be admitted. The admission of a large number of different items alleged to be comparable to the matter in question might make the trial unmanageably complex and lengthy and would amount to no more than cumulative evidence. Therefore, while the trial court must admit evidence of community standards after a proper predicate has been established, the volume of such evidence must be left to the

sound discretion of the trial court, and this court will not review the trial court's decision on this issue except for an abuse of discretion. See, *Chambers v. Culver,* 289 Ala. 724, 272 So. 2d 236 (1973); *Freeman v. Hall,* 286 Ala. 161, 238 So. 2d 330 (1970); *Stokes v. Bryan,* 42 Ala. App. 120, 154 So. 2d 754 (1963).

AFFIRMED.

Merrill, Harwood, Bloodworth, Maddox, McCall and Faulkner, JJ., concur;

Coleman, J., concurs in result;

Jones, J., dissents.

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[1] See *Roth v. United States,* 354 U.S. 476 (1957) (obscenity not within the area of constitutionally protected speech or press); *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) "'the dominant theme of the material taken as a whole appeals to a prurient interest in sex; the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and the material is utterly without redeeming social value.")

JONES, JUSTICE (Dissenting).

My views have been expressed in *McKinney v. City of Birmingham* ____ Ala. ____, ____ So.2d ____, (Ms., S. C. 484 and 485, May 9, 1974), released simultaneously with this opinion, and I respectfully dissent on the same grounds.

McKinney v. City of Birmingham, *S.C. 484 and 485*

JONES, JUSTICE (dissenting).

Petitioner, Chester McKinney, was convicted of violating the City of Birmingham Ordinance No. 67-2. This ordinance provides:

> "Section 3. It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the City or the police jurisdiction thereof, any obscene matter."

The ordinance further defines obscene material as follows:

> "A. 'Obscene' means that to the average person applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, predominant appeal

> shall be judged with reference to such audience. If the subject matter is distributed to minors under 18 years of age, predominant appeal shall be judged with reference to an average person of the actual age of the minor to whom such matter is distributed."

The petitioner challenges the constitutionality of this ordinance, claiming that it is repugnant to his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution and prays that the Court declare it unconstitutional as being too vague.

The majority rejects this contention; and I concede that, applying the minimum standards set by recent United States Supreme Court decisions wherein identical or similar statues have been upheld under the United States Constitution, we could not grant relief. *Paris Adult Theater I v. Slaton*, ____ U.S. ____, 93 S.Ct. ____, 37 L.Ed.2d 446 (1973); *Kaplan v. California*, ____ U.S. ____, 93 S.Ct. ____, 37 L.Ed.2d 492 (1973); *Heller v. New York*, ____ U.S. ____, 93 S.Ct. ____, 37 L.Ed.2d 745 (1973). To stop here, however, is to ignore two issues that yet remain:

(1) To what extent is the United States Supreme Court's interpretation of the minimum safeguard afforded by the United States Constitution controlling where the Alabama Constitution grants like or broader safeguards to personal freedom.

(2) In light of the individual rights protected by our State Constitution, as interpreted by this Court, is the city ordinance proscribing pornography constitutional?

As to the first issue, for far too long state constitutional freedoms have been overlooked, while all eyes have been cast

upon the United States Constitution for the protection of civil liberties. Although state constitutions contain full statements of our civil liberties, on the whole the record of state court guardianship of "First Amendment Freedoms" is disappointing. Only occasionally do state cases concerned with freedom of press and speech take a position protecting the freedoms beyond what has been required by the United States Supreme Court. In a well-reasoned article, Professor Monrad G. Paulsen[1] states:

> "State constitutions furnish extensive and sometimes unique materials, which can help in the protection of human liberties and state courts provide the forums in which a very great number of civil liberties cases are decided. Thus even when the argument for protection rests on Fourteenth Amendment grounds, the lower state courts and state supreme courts are in a strategic position to serve freedom of expression effectively. A case which stands for freedom in the state supreme court need be taken no further for the vindication of our deepest value."[2]

Thus, a brief lesson in constitutional law is in order. The First Amendment to the Federal Constitution declares, "*Congress* shall make no law ... abridging the freedom of speech or of the press ...." [Emphasis supplied]. The conduit through which the Bill or Rights is made obligatory on the states is the Fourteenth Amendment,[3] which provides:

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[1] Associate Professor of Law, Indiana University, Bloomington, Indiana.

[2] Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 Vand. L. Rev. 620 (1951).

[3] *Duncan v. Louisiana*, 391 U.S. 194, 88 S.Ct. 1444, 20 L.Ed. 491 (1968). It is interesting to speculate on the evolution of the doctrine of "selective incorporation" (which

> "No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State deprive* any person of life, liberty, or property, without due process of law . . . . " [Emphasis supplied].

This is no way impedes a state from providing greater safeguards to civil liberties through the construction of its own constitution. Indeed, the Ninth and Tenth Amendments of the Federal Constitution envisage this fundamental truth. This is to say that, while the Federal Constitution establishes the minimum safeguards afforded all citizens of the United States, the state, through its own constitution, may provide even greater protection for civil liberties.[4]

Therefore, we need not concern ourselves with the battle still raging over the extent to which the First Amendment of the United States Constitution protects obscenity.[5] We need

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applies minimum federal standards) had the states assumed their rightful roles of enforcing the fundamental standards of due process guaranteed by the state constitutions. See *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908); *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). See also *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

[4] *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); *Milky Way Production, Inc. v. Leary*, 305 F.Supp. 288 (S.D.N.Y., 1969). The state is free to give wider freedom of expression than the First and Fourteenth Amendments require.

[5] On the one hand the majority has continually held that the First Amendment has never been treated as an absolute. *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed.2d 1233 (1951). Obscenity is not constitutionally protected

only look to our own State Constitituion to find that freedom of expression is an absolute right. Alabama's analogous constitutional provision, Article I, § 4, reads:

> "That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments *on all subjects*, being responsible for the abuse of that liberty." [Emphasis supplied].

The only limitation contained therein is that one may be held civilly responsible for the abuse of such liberty (i.e., slander, libel, etc.).[6] To add support to this rejuvenated reliance upon

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speech or press under this amendment. *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Obscenity is not within area of constitutionally protected speech or press and may be regulated by the states. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). Obscene material is unprotected by the First Amendment. *Miller v. California*, supra.

On the other hand the court has had to contend with the dissenting views of Justices Douglas and Black. Mr. Justice Black's most noteworthy statement in this area is:

> "I read 'no law ... abridging' to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly 'beyond the reach' of *federal* power to abridge." *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

Mr. Justice Douglass, dissenting in *Roth* states:

> "The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislature from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position."

[6] See *Paulsen*, supra, at p. 623.

the state constitutional standard we should consider the most recent United States Supreme Court decisions of *Miller v. California*, ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Kaplan v. California*, ____ U.S. ____, 93 S.Ct. ____ 37 L.Ed.2d 492 (1973), and *Paris Adult Theatre I v. Slaton*, ____ U.S. ____, 93 S.Ct. ____, 37 L.Ed.2d 446 (1973). In these "obscenity" cases the Court stated that the permissible scope of regulation is to be applied by the application of local community standards specifically defined by state law. The very foundation of any such regulation must be the state constitution itself.

We turn now to the second issue – to what extent may "obscenity" be regulated in light of the broad safeguards protecting freedom of expression, "on all subjects," as set out in the Alabama Constitution?

Regulation of obscenity necessarily involves the balancing of the right of expression against the right not to be exposed thereto. The problem under the Federal Constitution begins with the United States Supreme Court's declaration that obscenity is not protected by the First Amendment.[7] This has led to the problem of specifically defining obscenity so as not to be overbroad. For years the United States Supreme Court has had to assume the role of a Board of Censors in attempting to limit such statutory definitions. Here we face the impenetrable barrier – who is to interpret this definition as applied to specific material? While under *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), there was a national standard, under *Miller* there is now a state or local standard. This is not a solution to the problem, but merely a decentralization of the Board of Censors' role from the Supreme Court in Washington, D.C., to the supreme courts in the 50 states, or perhaps to a single individual in a local community.

Miller is an attempt to give obscenity standards an interpretation more congruous with that of the local

[7] *Ginsberg v. New York*, 390 U.S. 629 (1968).

community in which it is applied. It is here that I depart from the reasoning and holding of the majority, for I contend that such standards cannot be constitutionally applied. The standard of the community toward sexuality changes so rapidly that any standard would be subject to continuous re-evaluation.[8] As a practical matter, what excites one person may shock another person and bore another. On a jury of twelve there will be this same subjective determination based upon individual morals. It is my conviction that to invoke criminal sanctions on such tenuous ground will inevitably violate due process, and I interpret § 4 in the absolution of its expression as the embodiment of this principle. Otherwise stated, I believe that the framers of our Constitution were keenly aware that anything less than literal construction of this safeguard (§4) would in and of itself be violative of the remaining guarantees of due process.

Where a particular area such as this is subject to such varying interpretations, the right of expression, per se – a basic fundamental of our democracy – should not be so arbitrarily deprived. Instead of passing this "hot potato," handed down to us from the United States Supreme Court, to the local communities and the ultimate triers of fact, I believe it is preferable to take the theoretically and practically more rational approach by embracing obscenity within the "all subjects" of the Alabama Constitution, Article I, § 4. Accordingly, I would hold that in the regulation of obscenity, the state's sole duty is to protect those of its citizens who do not consent to being actually (not constructively) subjected to behavior which they consider obscene. So too, minors, incapable of giving consent, are to be protected by the state.[9]

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[8] See Cairns, Paul and Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and Empirical Evidence*, 46 Minn. L.Rev. 1009 (1962).

[9] *Ginsberg v. New York*, 390 U.S. 629 (1968).

Outside of these two limitations (dictated by balancing constitutional considerations), the interest of freedom of expression must be preserved. The persons, excluding minors, who wish to be exposed to obscene material have the right,[10] just as those who wish not to be exposed have the constitutional right not to be so compelled. In making this available, the proprietor has the burden of not exposing those otherwise protected. In the instant case the absence of any potentially offensive advertisements and the presence of notices prohibiting minors and warning others of the content of the films, strikes the proper balance between the conflicting interests.[11]

In light of this balance of interests we must construe the current Alabama laws on obscenity which are found in Tit. 14, Chs. 64A, B, and C, § 374 (1)-(160), Code of Alabama 1940, as amended. Chapter 64A states the general prohibitions and penalties concerning obscenity; chapter 64B speaks to the sale exhibition, etc., of obscene material to minors; and chapter 64C concerns such sale to persons over eighteen. I would hold chapter 64A and 64C unconstitutional as violative of the Alabama Constitution, Art. I, § 4. At the same time, I would hold chapter 64B is a constitutionally permissible restriction on the sale of obscene material.

The foregoing is not to say that I personally condone the widespread proliferation of obscenity in society today.

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[10] *Stanley v. Georgia,* 394 U.S. 557 (1969). See also E. Keister, Jr., *Crimes With No Victims* at pp. 49-54 (1972). In the chapter entitled, "When Is a Movie Dirty?", the author notes the lagging laws on obscenity (specifically in New York) and notes that statutes restricting one's right to such material have no place in the law. He suggests better regulatory institutions such as the home and church.

[11] See Oregon Revised Statutes, Title 16, Chs. 167.060, 167.065, 167.070, 167.075 167.080, 167.085, 167.090, 167.095 (1971).

Admittedly, when I view the material before us in these cases, I am possessed by a compelling force to strike out against such immorality. I, like most, feel a compulsion to use the legal process to castigate these degrading manifestations of the sacred expression of love and thereby vindicate my own personal attitudes. To describe this material (8 16-mm. film in one case and 2 magazines in the other) as dirty, filthy, lewd, "sick," offensive is to be overly charitable. I deeply resent any such overt and avowed purpose to take human sexuality – which is good, wholesome, and holy – and plunge its purity into the depths of degradation. I acknowlege an obsession to force others to conform to my own standards of morality and to punish those guilty of non-conformity. But I believe that the restraint against such inclination is the very essence of the constitutional safeguards of personal liberties; that is to say, the organic basis of our legal process – the State Constitution – purposefully bridles this compulsion for the sake of individual freedoms.

Any realistic approach to the proper role of society in such matters must start from the premise that controlling crime and safeguarding morals are different things. More than 700 years ago, St. Thomas Aquinas wrote: "Private sin is different from public crime and only the latter lies in the province of man-made law." The government is the proper agent for controlling crime, while primary guardians of morality are the family, the church, the community and the organs of public opinion. These institutions, not government, must be strengthened and given every aid to perform their function in the moral sphere – a sphere where government should not, and cannot, effectively reach. It is now time for the venue over obscenity to be withdrawn from the courts and the concern shifted to those personal levels in routine life where it belongs.

Long ago Socrates wisely said: "No man is so thoroughly right as to be entitled to say that others are totally wrong. It is well to affirm your own truth, but it is not well to condemn those who think differently."

In this spirit, I register my dissent.

APPENDIX B

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law ... abridging the freedom of speech, or of the press ..."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ..."

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...

6. The pertinent provisions of Article I, §9 are:

"* * * No ... ex post facto Law shall be passed. * * *"

7. The pertinent provisions of Title 14, Section 374, Code of Alabama are:

(a) Section 374(3):

"'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

(b) Section 374(4):

Importation, sale or possession of obscene printed or written matter; penalties. – [1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material,

other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

SUPREME COURT, U. S.

DEC 26 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-537

J. L. PIERCE,

Petitioner

versus

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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I

OPINIONS OF THE COURTS BELOW

The memorandum of the Court of Criminal Appeals of Alabama, affirming the Petitioner's conviction without opinion, is not reported.

The opinion of the Supreme Court of Alabama affirming the Petitioner's conviction is reported as follows: *Pierce v. State*, ——Ala. ——, 296 So. 2d 218 (1974).

II

QUESTIONS PRESENTED

A.

Is an individual denied due process of law when he is prosecuted and convicted under a state statute outlawing obscenity where he is convicted under a construction of the statute defining "obscenity" in accordance with the pre-*Miller* standards and where state appellate courts reviewed said conviction in light of the *Miller* standards?

B.

Where a person engages in the regular business of selling publications which violate or approach violating the criminal statutes relating to obscenity and for that reason the party charges his customers higher prices than are charged by other business for publications of similar size and quality which do not approach a violation of the law, may such a party challenge a criminal conviction growing out his business on the grounds that he did not realize the publication in point was obscene?

C.

Is expert testimony necessary to enable a jury to judge the obscenity of material when that material has been placed into evidence?

D.

Does the action of the Alabama Supreme Court, by engrafting to Title 14, Section 374, by judicial construction,

the tests set forth in *Miller* and applying it on appeal to Petitioner's conviction, which conviction was pre-*Miller* and under a construction of the statute defining obscenity n accordance with *Memoirs,* violate post facto principles?

III

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Act No. 856, of the Regular, 1961 Session of the Legislature of Alabama. Vol. II, Pages 1310-1316 (unofficially codified as Title 14, Section 374(1)-374(16), Code of Alabama 1940, as amended (Recompiled 1959) (Supp. 1971).

IV.

STATEMENT OF THE CASE

The Alabama Supreme Court stated the case and facts as follows:

> "This case is before this court on a Writ of Certiorari to the Court of Criminal Appeals. Petitioner Pierce was charged with violating Title 14, Section 374(4), Alabama Code of 1940, as amended (Recompiled 1958) (Supp. 1971), in three separate indictments totaling 11 counts, all alleging that Pierce did 'sell, exhibit, or commercially distribute non-mailable and obscene printed or written matter.' The three cases were consolidated, and after a trial to a jury, Pierce was found guilty on all counts. Pierce appealed to the Court of Criminal Appeals which affirmed his conviction and denied rehearing, both without opinion. This court issued a Writ of

Certiorari to the Court of Criminal Appeals to determine whether the statute under which Pierce was prosecuted meets the constitutional requirements of the First, Fifth and Fourteenth Amendments as enunciated in 1973 cases decided by the Supreme Court of the United States, and, to determine the precise effect of these recent developments on cases not finally decided at the time the decisions were handed down.

"On three separate occasions, members of the Montgomery Police Department entered Jimmy's News Stand in Montgomery, Alabama, and purchased several items from petitioner Pierce at random. Officer Brown purchased 'The Pussy Kissers,' 'My First Trick,' 'The Beautiful Yogi and the Stud,' and 'Italia'; Detective Wright purchased the 'Filthy Funny Book' on one occasion and 'The Young Suckers,' 'The Hardup Head Mistress,' 'Little Nudist Quarterly' and a newspaper-type publication identified as 'Cruelty and Sex' on another occasion. All material purchased by both officers was in an area separated from the rest of the bookstore by a wire cage upon which a notice was posted stated, 'Persons under 21 not admitted.'

"The defendant attempted to put into evidence a number of exhibits tending to show what community standards were extant in Montgomery, Alabama, but an objection to the introduction of the exhibits was sustained. Defendant did call a witness who was allowed to testify as to community standards. The trial court charged that in determining whether the matter in evidence was obscene the jury was to consider the community standards of Montgomery, Alabama."

The Supreme Court of Alabama affirmed the Petitioner's

conviction on May 9, 1974. *Pierce v. State,* ——Ala. ——, 296 S. 2d 218 (1974). The major holdings of the Supreme Court of Alabama were as follows:

1. The tests set forth in *Miller v. California,* 413 U. S. 15 (1973) are engrafted by judicial construction to the 1961 Alabama obscenity statute.

2. With the Miller engraftments the 1961 Alabama obscenity statute is constitutional as applied in the context of the instant case.

3. Contemporary community standards referred to in *Miller* are statewide standards in Alabama.

In reaching its decision, the Alabama Supreme Court stated in its opinion inter alia:

> "The first issue this court must deal with is whether the statute contains the necessary specificity as required by *Miller*. The U.S. Supreme Court in *Miller* invites judicial construction as a method of supplying the required specificity if such is absent from the statute. As already mentioned, this court in McKinney I limited the reach of the statute by construing it as encompassing the then current *Roth-Memoirs* tests. The construction in *McKinney* I supplied all the elements of *Roth-Memoirs* tests even though these elements were missing from the statute as drafted. Similarly, this court now specifically incorporates the *Miller* guidelines or test heretofore set out into its construction of the word 'obscene' in Section 374(3). Thus the operation of the provisions of Section 374(4) applicable in this case is limited to matter which depicts or describes sexual conduct. The regulated matter is more specifically restricted to (a) 'Patently offen-

sive representation or description of ultimate sexual acts, normal or perverted, actual or simulated,' or (b) 'Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' Further, the state need only prove the work, taken as a whole, lacks serious literary, artistic, political or scientific value, rather than 'utterly' without such value as was formerly the test.

"The argument is made that *Miller* should not be retrospectively applied and that to construe the statute and apply it to the defendant in the instant case would violate ex post facto principles. This argument is without merit since the U. S. Supreme Court in a footnote to *Miller* states that 'existing statutes as construed *heretofore* or hereafter may be adequate.' (Emphasis added) *McKinney I* was decided prior to the defendant's arrest, indictment and conviction. *McKinney I* limits the operation of Section 374(4) to at least lewd discriptions or pictures of female genitals. This Court, in holding the matter before it to be obscene in an independent review in *McKinney I*, describes the matter as follows:

" 'The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spreadeagled apart, exposing her genital organs.'

* * *

" 'The appellant refers again and again in his briefs to the magazines or "girlie" magazines. A more apt description would be "genital" magazines.'

"Thus there is no doubt that from November 18, 1971, the date *McKinney I* was issued, all persons were

on notice that magazines which contained lewd photographs or descriptions of female genitals were subject to Section 374(4).

"In the case at hand, at least one exhibit covered in each indictment contains lewd photographs or descriptions of female genitals. There can be no doubt that as to such photographs or descriptions the *Miller* requirement for specificity had been supplied by *McKinney I* and that as applied to said matter, the potential vagueness of the statute had been cured by prior judicial construction.

"The other post facto problem arises because *Miller* establishes a new social value norm. If the defendant would have been protected by the test of *Roth-Memoirs* but not by the *Miller* standards then arguments pertaining to ex post facto considerations could arise. The defendant here was found guilty under the old, but more stringent, 'utterly' test, however, and an independent determination that the matter was utterly without redeeming social value was correct If a defendant is protected by the restrictiveness of the 'utterly' test then it is inescapable that he is within the protection shield of the 'serious' test for any publication which is utterly without value could have no serious value. Thus in this case there is no ex post facto problem applicable to the newly-created three-pronged test of *Miller*.

V.

ARGUMENT

Each of the questions raised by the Petitioner in this case have been answered by this Court unfavorably to Pe-

titioner in *Hamling v. United States*, ——U.S.——, 41 L. Ed. 2d 590, 94 S. Ct.——(1974). Both *Hamling*, supra, and the instant case involved convictions which were had prior to this court's decision in *Miller v. California*, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), but which had not become final at that time. Both convictions were had under statutes which had been construed as defining "obscenity" in accordance with *Memoirs v. Massachusetts*, 383 U. S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

A

Petitioner first asserts that Title 14, Section 374(4), Code of Alabama, was unconstitutionally vague as applied to him, arguing that the statute did not contain a description of the specific sexual conduct referred to in *Miller*, and that prior to *Miller*, the statute had not been construed to apply to that specific sexual conduct. That this court did not intend by *Miller* to hold unconstitutional all prior state statutes is expressed in *Hamling v. United States*, ——U. S. ——, 41 L. Ed. 2d 59, 94 S. St. ——, by Mr. Justice Rehnquist:

> "At no point does *Miller* or any of the other obscenity decisions decided last term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 USC § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller*, 413 US, at 24, n 6, 37 L. Ed. 2d 419, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes as construed heretofore or hereafter may well be adequate."

Prior to this Court's decision in *Miller*, Title 14, Section

374, had been authoritatively construed in a manner consistent with *Miller*. In a 1971 decision, the Alabama Supreme Court held that the Title 14, Section 374(3) definition of obscenity, upon which Section 374(4) is dependant, embodied the *Roth-Memoirs* tests. *McKinney v. State*, 287 Ala. 648, 254 So. 2d 714 (1971). This was prior to Petitioner's 1972 arrest and conviction. *McKinney*, supra, thus cured any potential vagueness in Section 374(4). Similarly, on review by Petitioner's case the Alabama Supreme Court specifically incorporated the *Miller* tests into the construction of the word "obscene" in Section 374(3), a procedure which this Court mentions in *Miller*, 413 U. S. at 24, n 6, 37 L. Ed. 2d 419, and a procedure which this Court followed in *Hamling*, supra. Likewise, as was this Court's holding in *Hamling* with respect to 18 USC, § 1461 [18 USCS, § 1461], the Alabama Supreme Court held that with the judicially engrafted *Miller* standards, Sections 374(3) and 374(4), as applied to the Petitioner's case, were constitutional.

The Petitioner's argument, that Section 374(4) was unconstitutionally vague at the time of his conviction because it included the "utterly without redeeming social value" test rejected in *Miller*, was settled against Petitioner in *Hamling* as follows:

> "Petitioners' final *Miller*-based contention is that our rejection of the third part of the *Memoirs* test and our revision of that test in *Miller* indicates that 18 USC § 1461 [18 USCS § 1461] was at the time of their conviction unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of 'social value.' But our opinion in *Miller* plainly indicates that we rejected the *Memoirs* 'social value' formulation, not because it was so vague as to

deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to 'prove a negative.' it imposed a '[prosecutorial] burden virtually impossible to discharge' and which was not constitutionally required. *Miller v. California*, 413 US, at 22, 37 L. Ed. 2d 419. Since *Miller* permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs*, and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners derive no benefit from the revision of that test in *Miller*."

B.

Contra to Petitioner's argument, Title 14, Section 374, Code of Alabama, has never been, nor was it in his case, construed to allow a conviction without proof of scienter or guilty knowledge. *Smith v. California*, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959), cited by Petitioner in support of his argument, is clearly distinguishable in that the Los Angeles ordinance invalidated in that case had been construed by state courts as making a bookstore proprietor absolutely liable criminally for mere possession even though he had no knowledge of the books' contents.

The distinction between the standards applied to those who act gratuitously and those who are motivated by profit was recognized by this Court in *Stanley v. Georgia*, 394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). This Court again recognized the distinction in *Miller* stating:

"The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust

> exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a misuse of the great guarantees of free speech and free press . . . . *Breard v. Alexandria*, 341 US, at 645, 95 L. Ed. 1233, 35 ALR 2d 335. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people, *Roth v. United States*, supra, at 484, 1 L. Ed. 2d 1498 (emphasis added). See *Kois v. Wisconsin*, 408 US, at 230-232, 33 L. Ed. 2d 312; *Thornhill v. Alabama*, 310 US, at 101-102, 83 L. Ed. 1093. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain is a different matter. [footnote omitted] 413 U. S. 15, 34-35, 37 L. Ed. 2d 419, 437.

In *Mishkin v. New York*, 383 U. S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), Petitioner, as here, argued that there was insufficient proof of scienter. This Court rejected that claim with Mr. Justice Brennan stating in part:

> "Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, . . . ; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and pos-

sessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that that appellant was 'aware of the character of the material' and his activity was 'not innocent but calculated purveyance of filth'."

Based on the above excerpt from Mr. Justice Brennan's opinion it seems difficult to contend that scienter was not sufficiently proven on the part of the State in the trial court. All the publications purchased from the Petitioner in this case were in an area separated from the rest of the bookstore by a wire cage upon which a notice was posted stating "Persons under 21 not allowed." There can be no doubt that the average person would easily detect the transparency of the character of materials entitled "The Pussy Kissers," "My First Trick," "The Beautiful Yogi and the Stud," "Young Suckers," "Cruelty and Sex," "Little Nudist," "The Hard Up Headmistress," and "Filthy Funny Book." The repetitive quality of the sequences and formats of the books was established by the Petitioner's own expert witness. There is the presence of an additional element which advances the contention that scietner was proven, and that is the exhorbitant prices paid for materials.

The establishment by the Petitioner as to the situs and manner of merchandising of the materials in the Appellant's store surely indicates that the Petitioner was "aware of the character of the material" and that his activity was "not innocent but calculated purveyance of filth."

It appears logical to the Respondent that if the character of the material was unknown to the Petitioner then he would have displayed it with the other publications in his store

(i.e., "Ladies Home Journal" and "House and Garden"), and would not have felt the necessity of separating the material by means of a "caged off" area.

C

The Petitioner's argument that the government presented no evidence that the particular publications were obscene is without merit. The jury had before them the publications which were introduced into evidence. Expert testimony is not necessary to enable a jury to judge the obscenity of material which has been placed into evidence. See *Hamling v. United States*, ——U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. ——; *Paris Adult Theatre I v. Slaton*, 413 US 49, 56, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); *Kaplan v. California*, 413 US 115, 120-121, 37 L. Ed. 2d 492, 93 S. Ct. 2680 (1973); *Ginzburg v. United States*, 383 US 463, 465, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966).

D

Petitioner argues that *Miller* should not be retroactively applied because to do so would violate ex post facto principles and amounts to an unforeseeable retroactive judicial construction.

In *McKinney v. State*, 287 Ala. 648, 254 So. 2d 714 (1971), cert. denied 405 U.S. 1075 (1972), decided prior to Petitioner's arrest and conviction, the Alabama Supreme Court limited the operation of Section 374(4) to at least lewd descriptions or pictures of female genitals. The material held obscene in *McKinney* was described by the court as follows:

"The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spreadeagled apart, exposing her genital organs."

* * * *

"The appellant refers again and again in his briefs to the magazines or 'girlie' magazines. A more apt description would be 'genital' magazines."

Thus, there can be no doubt that from the date *McKinney* was issued, Petitioner was on notice that publications containing lewd photographs or descriptions of female genitals were subject to Section 374(4).

In reviewing the exhibits which were placed in evidence at this Petitioner's trial, the Alabama Supreme Court found that at least one exhibit covered in each indictment contained lewd photographs or descriptions of female genitals.

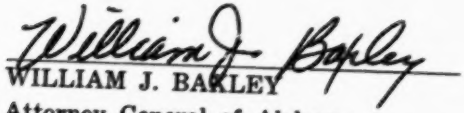
The Petitioner was convicted under the more liberal pre-*Miller* standards. If these publications were prohibited under the pre-*Miller* standards, they would certainly be prohibited under *Miller*.

The final difficulty with Petitioner's ex post facto argument is that it has been decided against him in *Hamling v. Unted States*, ——U. S. ——, 41 L. Ed. 2d 590, 94 S. Ct. —— (1974).

CONCLUSION

In conclusion, the Respondent, the State of Alabama, respectfully submits that for all the foregoing reasons the writ of certiorari ought to be denied and prays such denial.

Respectfully submitted,



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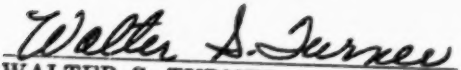

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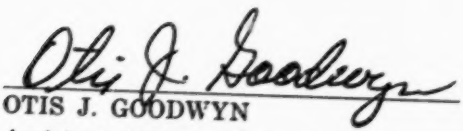

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CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, do certify that on this the 24th day of December, 1974, I did serve the requisite number of copies of the foregoing Brief of Respondent on each of the attorneys for the Petitioner, by mailing the same to them, air mail postage prepaid, addressed to them as follows:

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